99-217

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**

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| In the Matter of | ) | |
| | ) | |
| Promotion of Competitive Networks in Local Telecommunications Markets | ) | WT Docket No. 99-217 |
| | ) | |
| Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services | ) | |
| | ) | |
| Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/or Excessive Taxes and Assessments | ) | |
| | ) | |
| Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |
| | ) | |

# COMMENTS OF BLUESTAR COMMUNICATIONS, INC.

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## SUMMARY

BlueStar strongly supports the FCC in its efforts to open up multitenant dwellings to provision of competitive services by competitive local exchange carriers ("CLECs"). CLECs require access to riser cable in order to serve customers in multitenant buildings. BlueStar submits that the Commission should provide for adequate access to riser cable in multitenant buildings by eliminating the ability of incumbent local exchange carriers ("ILECs") to control access to this wiring. The Commission should permit building owners to make the key decisions concerning control of, and access to, this wiring subject to whatever oversight the Commission believes is lawful and appropriate. The Commission should accomplish this result by extending its program of deregulation of installation and maintenance of inside wiring to all wiring in multitenant buildings. The Commission should establish the minium point of entry ("MPOE") as the mandatory demarcation between the regulated telephone network and customer wiring for both new and existing installations; prohibit ILECs from exercising any rights of ownership over any wiring in multitenant buildings formerly on the network side of the demarcation point; and by permitting ILECs to continue to recover the costs of any wiring, they own in multitenant buildings formerly on the network side of the demarcation point through regulated telephone charges to the extent this wiring has not already been fully depreciated. If the Commission does not extend its program of installation and maintenance of inside wirng it should establish riser cable as an unbundled network element ("UNE"). BlueStar's experience is

that DSL can be provided over the same cable binder as telephone service without any adverse affect on telephone service.

BlueStar Communications, Inc.
WT Docket No. 99-217
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| In the Matter of | ) | |
| | ) | |
| Promotion of Competitive Networks in Local Telecommunications Markets | ) | WT Docket No. 99-127 |
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| Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services | ) | |
| | ) | |
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| Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |

## COMMENTS OF BLUESTAR COMMUNICATIONS, INC.

BlueStar Communications and its affiliate, BlueStar Networks, (collectively "BlueStar") submit these comments in the above-captioned proceeding. BlueStar provides DSL services to customers in multitenant buildings via in-building DSLAM multiplexing equipment located in the main aggregate telephone closet. The DSLAM is connected to a leased network and DS2 loops acquired from ILECS. From the DSLAM, BlueStar cross connects in punchdown blocks

to riser cable in the building. BlueStar then uses the riser cables in these multitenant buildings to connect the DSLAM with the end-user. Absent access to this riser, BlueStar will be prevented as a practical matter from providing DSL service in multi-unit buildings. BlueStar currently provides service in Tennessee, Kentucky and North Carolina via these arrangements and plans to offer service in South Carolina, Florida, Alabama, Mississippi and Georgia prior to the end of 1999.

## I. BUILDING OWNERS, NOT ILECS, SHOULD CONTROL MULTITENANT WIRING

The Commission over the last decade has established a comprehensive program that permits consumers and businesses to connect customer-provided wiring to the public switched telephone network.[1/] This program has provided substantial benefits to consumers and businesses. Consumers and businesses enjoy a greater range of service and facilities options by being able to choose inside wiring services and products from sources other than the incumbent LEC. At the same time, the Commission's rules under Part 68[2/] protect the network from harm that could be caused by customer provision of inside wiring.

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1/ *Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 88-57 (Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Competition of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68-213 of the Commission's Rules filed by the Electronic Industries Association), 5 FCC Rcd 4686 (1990) ("*Common Carrier Wiring Order*"); *Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking*, CC Docket No. 88-57 (Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network), FCC 97-209 (released June 17, 1997) ("*Common Carrier Wiring Reconsideration Order*").

2/ 47 C.F.R. Part 68.

BlueStar submits that the Commission should now seek to achieve the goals of the 1996 Act of creating "a pro-competitive, deregulatory national policy framework" by fully extending this program to all wiring in multitenant buildings. If the ILEC is allowed to retain control of riser cable because it was installed in an era when only the ILEC provided or was allowed to provide riser, the ILEC will (as BlueStar has experienced) most likely stifle competition by refusing access to the riser and preventing CLECS from accessing end-users in the building. This produces increased prices and further lowers consumer welfare. Instead, the Commission should seek to promote access to multitenant wiring by establishing that the building owner shall control wiring formerly installed and maintained by the ILEC.

The Commission should achieve this result by extending its program of deregulation of the installation and maintenance of inside wiring by applying to wiring in multitenant buildings the same determinations it previously applied to simple inside wiring on customers' premises. This includes establishing the demarcation point at the MPOE and prohibiting ILECs from exercising any rights of ownership with respect to wiring installed and owned by them in multi-unit installations.[3/] In order to assure that there is no unjust taking of ILEC property, the Commission can provide that the costs of wiring formerly on the network side of the demarcation point can continue to be recovered from regulated telephone charges. BlueStar believes that for

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[3/] The Commission has previously prohibited incumbent LECs from exercising any ownership rights over simple inside wiring. *Inside Wiring Detariffing Order*, CC Docket 79-105, 51 Fed. Reg. 8498 (1986), paras.52, 57, *recon. in part, Inside Wiring Reconsideration Order*, 1 FCC Rcd 1190, *further recon.* 3 FCC Rcd 1719 (1988), *remanded* NARUC v. FCC, 880 F.2d 1989. The term "simple inside wiring" refers to telephone wiring installations of up to four access lines. *See* 47 C.F.R. § 68.213.

the most part this wiring will have already been fully depreciated and there will be little if any continuing charges to regulated ratepayers for this wiring. The Commission should also provide that the building owner or a CLEC, at their option, may purchase riser at the depreciated price.

At a minimum, new entrants must have access to the conduit in multitenant building. Under Section 224 of the 1996 Act and the rules for unbundled elements, the conduits are even more essential to reach the tenants in such a building. It is simply impossible to reach these new customers in multitenant buildings without going through the conduits. Everyone, ILECs included, agrees that all LECs should have access to all buildings via conduits. They are essential facilities under any test.

## II. THE COMMISSION HAS AUTHORITY TO PROVIDE FOR BUILDING OWNER CONTROL OVER MULTITENANT WIRING INSTALLED AND OWNED BY ILECS

The Commission's authority over inside wiring has been established in previous proceedings before the Commission.[4/] Inside wiring refers to the customer premise portion of the telephone network that connects station components to each other and to the public telephone

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[4/] Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp., 7 FCC Rcd 1619, 1621 (1992) (quoting New York Tel. v. FCC, 631 F.2d 1059, 1066 (2d Cir. 1980)); *see also* Puerto Rico Tel. Co. v. FCC, 553 F.2d 694, 699 (1st Cir. 1977); MCI Communications Corp. v. AT&T, 369 F. Supp 1004, 1028-1029 (E.D.Pa. 1974), *vacated on other grounds*, 496 F.2d 214 (3d Cir. 1974). *See* NARUC v. FCC, 746 F.2d 1499 (D.C.Cir. 1984) ("The dividing line between the regulatory jurisdictions of the FCC and state depends on 'the nature of the communications which pass through the facilities [and not on] the physical location of the lines'") (citations omitted); *id.* at 1498 ("[e]very court that has considered the matter has emphasized that the nature of the communications is determinative rather than the physical location of the facilities used").

network.[5/] This customer premise portion, or inside wiring, of the network, while physically intrastate, is used for interstate and foreign communications. Therefore, the Commission has subject matter jurisdiction over inside wiring under section 2(a) of the Communications Act of 1934, as amended.[6/]

As noted, the Commission has already exercised its authority over inside wiring when it adopted Part 68 of the Commission's rules.[7/] These rules govern the terms and conditions under which customers may connect their premises equipment, including inside wiring, to the public telephone network.[8/] Thus, the use of inside wiring for interstate and foreign communications and the decision to connect inside wiring to the public telephone network, all firmly establish the Commission authority to regulate the ownership, control, maintenance and operation of this wiring.

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5/ *Report and Order*, Docket No. 82-681, Modification to the Uniform System of Accounts for Class A and B Telephone Companies, 48 Fed. Reg. 50534, slip op. at 3 (Nov. 2, 1983).

6/ 47 U.S.C. § 152(a); The provisions of this act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, . . . ." *Id.*

7/ *E.g.* 47 C.F.R. §§ 68.213 and 68.215 (1997).

8/ *See* Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, n.4 (1986). *See also* Maryland Public Service Comm'n v. FCC, 909 F.2d 1510 (D.C.Cir. 1990); California v. FCC, 905 F.2d 1217 (9th Cir. 1217); Texas Public Utility Comm'n v. FCC, 886 F.2d 1325, 1331 (D.C. Cir. 1989); National Association of Regulatory Commissioners v. FCC, 880 F.2d 422, 429 (D.C.Cir. 1989); North Carolina Utilities Comm'n v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976); North Carolina Utilities Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

The Communications Act directly empowers the Commission to establish rules and regulation in the public interest and in furtherance of Congress' vision of a competitive telecommunications industry. Section 4(i) of the Act directs the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of its functions."[9/] The Commission has concluded that it may "properly take action under Section 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission's functions."[10/] Indeed, in consideration of cable home run wiring, the Commission has found it necessary to regulate inside wiring to meet the critical goal of the Act to promote end-to-end alternative competition.

## III. MULTITENANT WIRING SHOULD BE DESIGNATED A UNE

If the Commission does not extend the deregulation of installation and maintenance of inside wiring to all wiring in multitenant buildings at the election of the building owner, the Commission should establish that such wiring is a UNE. Most riser cable is installed as the building is constructed in conduits supplied by the building. The ILEC runs large cables that efficiently supply copper or fiber to all the occupants of a multitenant building. Most of these

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9/ *Telecommunications Services - Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd. 3659, 3700 (rel. Oct. 17, 1997) ("*R&O*"), *citing* 47 U.S.C. § 154(i); *see also North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1289-93 (7th Cir. 1985) (Section 4(i) "empowers the Commission to deal with the unforeseen – even if that means straying a little way beyond the apparent boundaries of the Act – to the extent necessary to regulate effectively those matters already within the boundaries.").

10/ *Id.* at 3700, *citing Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975); *Mobile Communications Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 81 (1996).

cables have significant unused capacity because the cost of pulling the riser is much greater than the cost of the actual cable and leaving a large number of pairs unoccupied and unused does not increase the cost per occupied pair significantly. It is probably impossible for the new entrant to duplicate this cost efficient installation activity; and it is certainly impossible for a new entrant to install the riser cable at a cost anywhere near the cost to the ILEC. Failure to allow access to the riser will certainly impair any attempt to offer competitive alternatives to the ILEC in that building. In addition, there usually never was any real contract between the ILEC and the building to install the riser. At that point in time there was no alternative to ILEC wiring and the building owner simply asked the ILEC to wire the building with no arms length negotiation or payment. This type of purely historical advantage is exactly the handicap that the 1996 Act was designed to remove. Asking a new entrant to run riser cable in each building in which it has a customer is just as impractical as suggesting that it should rewire a specific neighborhood. Indeed, ILECs run loops from the end office to a customer premise passing through the riser without any complaint. At most, this is a form of subloop unbundling where no BFR should be necessary and technical feasibility has been proven.

The general principle for pricing these UNEs should be TELRIC. There should, however, be a variety of the scorched node assumption. As pointed out above, all the ILEC riser was installed in a greenfield environment in conduits provided by or paid for by the building owner. Thus the TELRIC cost of installing the riser cable is the cost of pulling the cable plus the cost of the cable divided by the number of cable pairs. If the commission chooses to force new entrants to pay for riser cable, then it should set a proxy guideline such as 10% of the unbundled

loop price pending the outcome of state dockets. There also should be no long drawn out BFR or other ordering process. CLECs are today using riser cable without any difficulty in assignments. CLECs should simply have the right to select an empty riser pair and report the use to the ILEC if it insists on maintaining records.

## IV. DSL CAN BE PROVIDED OVER THE SAME CABLE BINDER AS TELEPHONE SERVICE WITHOUT ANY ADVERSE AFFECT ON TELEPHONE SERVICE.

BlueStar has already proven that DSL can ride in the same cable binder as POTS without any adverse effects on the POTS. Blue Star currently occupies over 20 buildings in Nashville, Memphis and Louisville with DSLAMs in the basement connected to the BlueStar network. BlueStar accesses customers in these buildings by using the riser cable under a license from building management. These same riser cables carry the POTS and other traffic from the main aggregate phone closet to the end-users. There have been no complaints of technical problems from either the POTS or the DSL users. This proves that allowing DSL and other advanced services to use the same riser as POTS and other traditional voice traffic will not harm the network. Indeed, the technical feat of running DSL over the same loop which carries voice traffic, just as the RBOCs do with DSL, tackles much greater technical issues. Thus, there is no issue of technical feasibility in unbundling riser cables for advanced services. The NID or other demarcation point in the building allows a CLEC to connect to the riser just as the ILEC connects its loops to the riser.

## V. CONCLUSION

For these reasons, BlueStar respectfully requests that the Commission extend its program of deregulation of the installation and maintenance of inside wiring to all wiring in multitenant buildings or alternatively designate wiring in multitenant buildings a UNE.

Respectfully submitted,

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Dated: August 27, 1999

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was hand delivered this 27th day of August, 1999, to the following:

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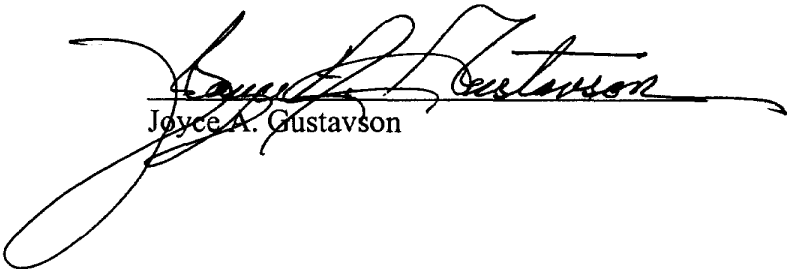

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